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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

Nos. 90-757 and 90-1032

RONALD CHISOM, *ET AL.*, PETITIONERS,

v.

CHARLES E. ROEMER, *ET AL.*

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES E. ROEMER, *ET AL.*

BRIEF FOR *AMICI CURIAE* THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF RESPONDENTS

INTERESTS OF *AMICI CURIAE*[1]

The Washington Legal Foundation ("WLF") is a non-profit public interest law center, based in Washington, D.C., with over 120,000 members and supporters nationwide. WLF has participated in and has devoted a substantial portion of its resources to cases relating to voting rights. WLF filed *amicus curiae* briefs in *Thornburg v.*

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[1]This brief is being filed with the written consent of the parties. Their consents are on file with the Clerk of this Court.

Gingles, 106 S. Ct. 2752 (1986) and *City of Pleasant Grove v. U.S.*, 107 S. Ct. 794 (1987). More pertinently, WLF filed briefs in the instant case below, *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir. 1988); and in the related case *League of United Latin American Citizens Council No. 4434 v. Clements*, 914 F.2d 620 (5th Cir. 1990)(hereinafter "*LULAC*").

In this case, WLF seeks to protect the interests of its members in the proper interpretation of the federal Voting Rights Act of 1965, as amended ("VRA"). The court below correctly concluded that the results test of Section 2 of the VRA did not apply to judicial elections -- a decision which accurately reflects the history and meaning of the VRA. WLF believes that as a matter of law and sound public policy, Congress had good reasons for excluding the judiciary from the definition of "representatives" in Section 2. Any changes to include the judiciary under Section 2 should be clearly expressed by the Congress after full debate rather than by distorting statutory language chosen by Congress.

The Allied Education Foundation ("AEF") joins WLF as an *amicus* on this brief. AEF, established in 1964, is a non-profit, charitable and educational foundation based in Englewood, New Jersey, and devoted to the expansion of knowledge in a broad variety of areas including voting rights and the political process. AEF has appeared along with WLF as *amicus* in *Chisom v. Edwards* below and several cases before the United States Supreme Court.

STATEMENT OF THE CASE

Amici adopt by reference the Statement of the Case by respondents. Nevertheless, *amici* wish to note the following pertinent facts. The Supreme Court of Louisiana consists of seven members who are elected

from six judicial districts; two from the First District, and one each from the remaining five. The petitioners essentially allege that the system of electing the two judges in the First Supreme Court District of Louisiana constitutes a violation of Section 2 of the Voting Rights Act (VRA) because allowing two judges to be elected from the First District which has approximately 68 percent white voters and 32 percent black, "illegally dilutes the voting strength of Orleans Parish's African American voters by submerging that majority African American parish in a majority white district." Chisom Br. 4. In essence, Chisom seeks to divide the First District into two separate districts in such a way that minority voters constitute a majority in one district, presumably to ensure the election of a black judge to Louisiana's highest court.

SUMMARY OF ARGUMENT

In amending the Voting Rights Act of 1965 in 1982, Congress enacted the "results test" to prove voting discrimination, a test previously rejected by this Court in *City of Mobile v. Bolden*, 446 U.S. 55 (1980). In doing so, however, Congress limited the applicability of the test to the election of "representatives" and thus excluded elected members of the judiciary from the reach of Section 2. The plain and ordinary meaning of that term does not include judges. The role of judges is both historically and jurisprudentially different from that of the political legislative branches. In addition, case law demonstrates that the concept of voter dilution is *not* applicable to judicial elections. Because Section 2 is based entirely upon voter dilution, that section does not apply to judicial elections.

ARGUMENT

I. THE ELECTION OF JUDGES IS NOT SUBJECT TO SECTION 2 OF THE VOTING RIGHTS ACT BECAUSE JUDGES ARE NOT "REPRESENTATIVES."

A. The Plain Meaning Of "Representatives" In Section 2 Of The VRA Does Not Include Members Of The Judicial Branch.

The 1982 amendment of the Voting Rights Act of 1965 added language describing those circumstances that would constitute a violation of Section 2. Section 2(b) expressly states that a violation exists when "[members of a protected class] have less opportunity than other members of the electorate to participate in the political process and to elect *representatives* of their choice."

This Court has repeatedly affirmed the "familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Stated another way, courts are required to assume "that the legislative purpose is expressed by the ordinary meaning of the words used," *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (*quoting Richard v. United States*, 369 U.S. 1, 9 (1962)). *See also INS v. Cardoza-Fonseca*, 480 U.S. 421, 432, n.12 (1987) (Court looks to message conveyed by "the plain language of [the] statute" and looks at the "legislative history to determine only whether there is

'clearly expressed legislative intention' contrary to that language"). [2]

According to Black's Law Dictionary, the ordinary meaning of the word "representative" is "A person chosen by the people to represent their several interests in a legislative body; *e.g.* representative elected to serve in Congress from a state congressional district." Black's Law Dictionary 1302 (6th ed. 1990). Clearly, the ordinary meaning of the term "representative" in the context of elections is a legislative or executive office holder, not a judge.

Judges, by their very definition, do not "represent" voters but are "appointed [or elected] to preside and to administer the law." Black's Law Dictionary (6th ed. 1990). Unlike legislative bodies, judges do not make decisions as representatives of their electorate. No segment of the electorate can be overrepresented or underrepresented in the minds of the judicial branch. A judge's duty is to apply the law as best he can, and the race, sex, or geographical location of his colleagues enters into the balance not at all. As expressed by Hamilton in *Federalist*, No. 78:

> If it is to be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from

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[2] *See also Sullivan v. Stroop*, 110 S.Ct. 2499, 2502 (1990); *United States v. Locke*, 471 U.S. 84, 96 (1985); *Mohasco Corp. v. Silver*, 447 U.S. 807, 813 (1980)(literal reading of civil rights law required even though there is a "strong federal policy of insuring that employment discrimination is redressed").

> any particular provisions in the constitution. It is not otherwise to be supposed that the constitution would intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. . . .

And as the en banc court in *LULAC* emphasized:

> We reiterate that judges do not represent people and, thus, have no constitutents. Judges speak the voice of the law. In doing so they speak for and to the *entire* community, never for segments of it and still less for particular individuals. To describe the judge's office merely as "not a representative one" is a gross understatement; in truth, it is rather the precise antithesis of such an office. Just insofar as a judge *does* represent anyone, he is not a judge but a partisan.

914 F.2d at 628 (emphasis in original).

Amici submit that the principles underlying the role of the federal judiciary are equally applicable to the judiciary of the individual states. For example, in *Morial v. Judiciary Committee of State of Louisiana*, 565 F.2d 295 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978), the Fifth Circuit held:

> The Louisiana constitution, like the federal constitution, creates a separate judicial branch. Article V of the Louisiana constitution is devoted

> entirely to the functions and duties of that branch. The structure, powers, duties, and emoluments of the state's judiciary are treated differently from those of "Public Officials," who are dealt with in a separate article of the constitution, article IX.
>
> Because the judicial office is different in key respects from other offices, the state may regulate its judges with the differences in mind. For example, the contours of the function make inappropriate the same kind of particularized pledges of conduct in office that are the very stuff of campaigns of most non-judicial offices. A candidate for the mayoralty can and often should announce his determination to effect some program, to reach a particular result on some question of city policy, or to advance the interests of a particular group. It is expected that his decisions in office may be predetermined by campaign commitment. He cannot, consistent with the proper exercise of his judicial powers, bind himself to decide particular cases in order to achieve a given programmatic result. Moreover, the judge acts on individuals cases and not broad programs. The judge legislates but interstitially; the progress through the law of a particular judge's social and policy performance preference is, in Mr. Justice Holmes' words, "confined from molar to molecular motion." (Footnote omitted) (Citation omitted).

Id. at 305.

In Louisiana, judges are elected in *non-partisan* elections (LSA-R.S. 18:401(B)) from among candidates who "have been admitted to the practice of law in this state for at least 5 years prior to his election, and shall have been domiciled in the respective district . . . for the two years proceeding election." La. Const. art. V, Section

24 (1974). By comparison, the qualifications for a Louisiana state legislator are that the candidate need only have "obtained the age of 18 years, resided in the state for the preceding two years, and been actually domiciled for the preceding year in the legislative district from which he seeks election." La. Const. art. III, Section 4 (1974). The distinction that judges have legal training and experience underscores their role and function of interpreting the law, rather than creating laws to suit political or public policy demands. In addition, as will be discussed *infra*, the distinction shows why the usual factors used by minority plaintiffs to demonstrate voter dilution in legislative elections are inapposite in the context of judicial elections.

Other courts have clarified the fundamental distinction between judicial office and representative office:

> Judges do not represent people, they serve people. They must, therefore, be conveniently located to those people whom they serve. Location, then, is one of many significant factors which the legislature may properly consider when carrying out its constitutional mandate to create an effective judicial system.

Buchanan v. Rhodes, 249 F. Supp. 860, 865 (N.D. Ohio), *app. dismissed*, 385 U.S. 3 (1966).

To avoid any mistaken conclusion that might be drawn from the requirements that judges come from certain judicial districts, a federal court has noted:

> These judges are hybrid officials with both local and statewide functions and authority. The requirement that he reside from the district in which he is elected is a matter of convenience,

> making him available to hear emergency matters, and convenience is an essential factor in arranging an effective judicial system. He rotates among the districts of his division, and he may be assigned beyond his division by the Chief Justice.

Holshouser v. Scott, 335 F. Supp. 928, 933 (M.D.N.C. 1971), *aff'd*, 409 U.S. 807 (1972). Indeed, judges "are not representatives in the same sense as are legislators or the executive. Their function is to administer the law, not to espouse the cause of a particular constituency." *Stokes v. Fortson*, 234 F. Supp. 575, 577 (N.D. Ga. 1964). As recently as 1986, the Supreme Court in reviewing voting rights cases has never suggested that the VRA extends to any category of elected officials other than "representatives." *See Thornburg v. Gingles*, 478 U.S. 30, 47-48 (1986).

"Representatives" therefore has a clear, unambiguous legal meaning. It is a term of art and it cannot be assumed to have a novel, generic meaning within the context of the VRA. The courts should indeed accept the plain language of any statute as the true expression of Congressional intent. Surely the United States House of *Representatives*, in approving Section 2, ought to at least be credited with knowing the correct meaning of that word. Since the meaning of "representatives" is plain, "that is the end of the matter, for the court . . . must give effect to the unamibiguous expressed intent of Congress." *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

As the lower court stated, "to suggest that congress chose "representatives" with the intent of including judges is roughly on a par with suggesting that the term *night*

may, in a given circumstance, properly be read to include *day*." *LULAC*, 914 F.2d at 629.[3]

B. The Legislative History Of Section 2 Also Demonstrates That The Statute Was Not Intended To Apply To Judicial Elections.

While resort to legislative history is neither proper nor necessary where the statutory language is clear,[4] the history of Section 2 does not support the petitioners'

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[3] An additional argument made by the petitioners to show that the term "representatives" includes elected judges is the notion that in criminal cases, unelected juries which perform their function in the judicial setting have been generally regarded as "representatives of the people." Chisom Br. 56-62; U.S. Br. 23-24. However, the "representativeness" of juries, a general characterization used in the context of a criminal defendant's Sixth Amendment right (or an excluded venireman's Fourteenth Amendment right) sheds no light on what the Congress specifically intended by the term "representatives" used in the context of voting rights legislation. Under petitioners' theory, if unelected jurors are "representatives," a hypothetical system of electing professional jurors should make them even more representative. The petitioners are clearly grabbing at straws by trying to find the broadest definition of the word "representative" outside of the election context in which Congress chose to use that word.

[4] As this Court recently stated:

> The best evidence of [a statute's] purpose is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous--that has a clearly accepted meaning in both legislative and judicial practice--we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process.

West Virginia University Hospitals, Inc. v. Casey, 59 U.S.L.W. 4180, 4184 (U.S. Mar. 19, 1991).

position that Congress intended the results test to apply to the judiciary. The Voting Rights Act, when originally approved and through subsequent amendment, was certainly one of the most heavily debated and, to some members of Congress, most controversial pieces of legislation. It cannot be assumed that both houses of Congress simply allowed enactment of the VRA without careful consideration of each affected area -- including one entire branch of our form of government.

Therefore, while the legislative history of the Voting Rights Act does not directly address the issue of Section 2 applicability to the judiciary, the absence of any clear indication of applicability leads to the inevitable conclusion that members of the judiciary were never meant to be included within its scope. Although perhaps not in 1965, by the time the 1982 VRA amendments were debated, many states had elected judges and the word "representatives" as chosen for the amended Section 2 could not at that time have been considered synonymous with all "elected officials."

Furthermore, as the lower court observed, at the time that Congress enacted the amendments to the VRA in 1982, "at least fifteen published opinions by federal courts . . . had held or observed that the judicial office is not a representative one, most often in the context of deciding whether the one-man, one-vote rubric applied to judicial elections. Not one held the contrary." 914 F.2d at 626. *See, e.g., Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972), *aff'd mem.*, 409 U.S. 1095 (1973).

The only direct mention of judicial districts in the legislative history is contained in a short statement by Senator Orrin Hatch. Senator Hatch was at the time voicing his strong opposition to the legislative reversal of

Mobile v. Bolden, 446 U.S. 55 (1980), through the Section 2 revisions. That statement argued:

> Every political subdivision in the United States would be liable to have its electoral practices and procedures evaluated by the proposed results test of Section 2. It is important to emphasize at the onset that for the purposes of Section 2, the term "political subdivision" encompasses all governmental units, including city and county officials, school boards, judicial districts, utility districts, as well as state legislatures.

S. Rep. No. 97-417, 97 Cong., 2d Sess. 127, 151, *reprinted in* 1982 U.S. Code Cong. & Admin. News 298, 323. The court below properly discounted the value of this legislative "scrap" or "scouring," noting that it does not refer to judicial candidates but judicial districts. In Lousiana and many other states, sheriffs, clerks of court, highway commissioners, and other non-judges are elected according to judicial districts. 914 F.2d at 630, n.14.

Amici further submit that Senator Hatch's statement was meant to be argumentative and persuasive rather than intended to define the actual scope of the Act. Senator Hatch was obviously creating a strained interpretation of the Section 2 amendments' "results test" in order to dissuade other Senators from approving the revisions. The Senator did not provide any authority for his suggestion of the potential scope of Section 2 and it is unlikely indeed that he would have even uttered the comments had he thought that those words might be used to justify an expansive interpretation of the same amendments against which he so vigorously argued. Indeed, it would stifle future congressional debate if every extraordinary and twisted argument appearing deep within legislative history were raised to the level of legal

authority or precedent. Just as a dissenting opinion in a court case should not be construed as a definitive statement of what the law is, neither should "dissenting" statements of members of Congress be construed as legislative intent.

"The fears and doubts of the opposition are no authoritative guide. . . . It is the sponsors that we look to when the meaning of the statutory words is in doubt." *First Nat'l Bank v. Walker Bank & Trust Co.*, 358 U.S. 252, 259-60 (1966). As this Court has recognized, "[i]n their zeal to defeat a bill, [opponents] understandably tend to overstate its reach." *NLRB v. Fruit & Vegetable Packers*, 377 U.S. 58, 66 (1964). *See also Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 288 (1956)("unsuccesful minority cannot put words into the mouths of the majority and thus, indirectly, amend a bill").

II. VOTER DILUTION, ALLEGED BY CHISOM AND UPON WHICH SECTION 2 IS BASED, IS NOT APPLICABLE TO JUDICIAL ELECTIONS.

The VRA was last amended in 1982 to clarify its meaning after a 1980 Supreme Court decision holding that Section 2 prohibited only intentional discrimination in voting practices. *Mobile v. Bolden*, *supra*. That amendment prohibits any voting procedure "which *results* in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a) (emphasis added). Congress also added a new Section 2(b) to explain the change:

> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to a nomination or election in the State or political

> subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process *and* to elect *representatives* of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population. (Emphasis added).

The clear language that the members of the class must have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," in order to establish a right to relief under the present amended version of Section 2 constitutes a textbook definition of voter dilution. The requirements are conjunctive. The plaintiffs would not prevail by showing only that they have less opportunity "to participate in the political process." They must also show that they have less opportunity "to elect representatives of their choice." Section 2 guarantees that the voice of minority voters must be heard at the polls *and* represented in the government as strongly as the voices of nonminority voters.

Having demonstrated that Section 2 addresses the issue of voter dilution, the history of voter dilution shows that neither the dilution doctrine nor Section 2 is applicable to judicial elections. The concept of dilution stems from the Supreme Court's decision in *Reynolds v. Sims*, 377 U.S. 533 (1964). This decision was well known to Congress in 1965, and the Supreme Court has held that Congress intended to incorporate into the Voting

Rights Act the broad concepts of voting set forth in that decision. *Allen v. State Board of Elections*, 393 U.S. 544, 565-66, 569 (1969). Indeed, the authors of the Senate Judiciary Committee Report looked to *Reynolds* in setting forth the scope of the most recent amendments to the Act. S. Rep. No. 417, 97th Cong., 2d Sess. 19-27 (1982) (hereinafter cited as Senate Report). *See also* Blacksher & Menefee, "At-Large Elections and One Person, One Vote: The Search for the Meaning of Racial Vote Dilution," in C. Davidson, *Minority Vote Dilution*, 203, 207-21 (1984); Parker, *The "Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 Va. L. Rev. 715, 718-719 (1983). *Cf. Thornburg* v. Gingles, 478 U.S. at 47, n.13.

In all of the judicial opinions and legislative history generated during the first 20 years under the Act, there is not a single suggestion that the concept of dilution reaches more broadly than the principles set forth in *Reynolds* and the cases that followed over the next several years. It was clear by the 1975 amendments to the Act, if not before, that the rule of *Reynolds* did not encompass a state's decisions with regard to the structure of its judiciary. "The Louisiana constitutional provisions, which this Court today upholds against appellants' renewed constitutional attack, provide for the election of the State's Supreme Court Justices from election districts that are established without regard to population." *Wells v. Edwards*, 409 U.S. 1095 (1973) (White, J., dissenting), *aff'g*, 347 F. Supp. 453 (M.D. La. 1972). The district court's decision in *Wells*, which the Supreme Court affirmed, held "that the concept of one-man one-vote apportionment does *not* apply to the judicial branch of the government." 347 F. Supp. at 454 (emphasis added). Just weeks before, the Supreme Court had summarily affirmed a holding of another District Court "that the one-man, one-vote does *not* apply to the State Judiciary."

Holshouser v. Scott, 335 F. Supp. 928, 932 (M.D.N.C. 1971), *aff'd*, 409 U.S. 807 (1972) (emphasis added). *See also Buchanan v. Rhodes*, 249 F. Supp. 860 (N.D. Ohio), *app. dismissed*, 385 U.S. 3 (1966). Although the Supreme Court has not yet spoken on the subject, the only federal court to do so had held that "the one-man one-vote doctrine, applicable as it now is to selection of legislative and executive officials, does not extend to the judiciary." *Stokes v. Fortson*, 234 F. Supp. 575, 577 (N.D. Ga. 1964).

The rationale of these decisions is immediately apparent. *Reynolds* addressed itself to the problem of assuring equal representation for all citizens in the multi-member legislative bodies. One way to do that, as the Supreme Court recognized in the context of State congressional delegations, is through at-large elections. *Wesberry v. Sanders*, 376 U.S. 1, 8 & n.11 (1964). As a practical matter, however, jurisdictions as large as States must elect their governing bodies from districts. As the Court noted in *Reynolds*:

> Legislators represent people, not trees or acres . . . And it is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five or 10, while the votes of persons in another area would be counted only at face value, could be constitutionally sustainable. Of course, the effect of the state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical. Overweighing and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there.

377 U.S. at 562-63 (footnote omitted). The court correctly concluded, "[b]ut the basic principle of representative government remains, and must remain, unchanged -- the weight of a citizen's vote cannot be made to depend on where he lives." 377 U.S. at 567. If dilution thus applies only to representational bodies of government, neither dilution nor its statutory remedy found in Section 2 may apply to elections of the non-representational judiciary.

It having been established by 1982 that neither the Supreme Court nor the lower federal courts regarded judges as representatives subject to the dilution doctrine and that Section 2 addresses the issue of voter dilution, it is thus impossible to conclude otherwise than that Section 2 does not apply to the election of judges.

As previously noted, Chisom's complaint specifically charges that the present system of electing judges, whereby the parishes of Orleans, St. Bernard, Plaquemines, and Jefferson elect two Justices to the Louisiana Supreme Court at-large from the First District is a violation of the 1965 Voting Rights Act, as amended, 42 U.S.C. § 1973 *because it allegedly dilutes the voting strength of the plaintiffs*. Chisom Br. 4. Chisom has therefore alleged voter dilution and sought a remedy through the VRA when the courts have already considered the scope of dilution and not found it applicable to judicial elections. The dilution doctrine is simply not applicable to non-representative government bodies such as the judiciary and therefore Chisom's claim that Section 2 applies must fail.

Accordingly, Chisom's Complaint does not allege facts that, even if taken as true, would prove that they have had less opportunity "to elect *representatives* of their choice" (emphasis added). They may or may not be able

to demonstrate that they have less opportunity to elect judges of their choice, but -- as demonstrated in Argument I, *supra*, judges are not representatives.

Chisom's allegations, therefore, could not possibly support a claim under Section 2. Unless there is strong evidence in the legislative history to demonstrate that Congress intended to classify judges as representatives, this Court could not find that their votes were diluted and should not act as a legislature of last resort incorporating judicial elections into the otherwise clear dilution language of Section 2.

It may further be noted that the application of Section 2 to judicial elections, proven inappropriate, may be found appropriate solely because Section 5 does, in fact, cover judicial elections. *Haith v. Martin*, 618 F. Supp. 410 (E.D.N.C. 1985), *aff'd*, 477 U.S. 901 (1986). The defendants in *Haith* argued that Section 5 did not apply to judicial elections, relying on the "one man, one vote" cases. In rejecting these cases as inapplicable the District Court stated:

> Discounting the interesting jurisprudential arguments arising from such an attempted distinction . . . it is quite clear that no such distinction can be attributed to [Section 5 of the Voting Rights] Act . . . As can be seen, the Act applies to all voting without any limitation to who, or what, is the object of the vote . . . We hold that the fact that an election law deals with the election of members of the judiciary does not remove it from the ambit of Section 5.

618 F. Supp. at 413.

The Court in *Haith* was quite specific in limiting the scope of its conclusion to Section 5. Furthermore, the substantial differences in language and history between Sections 2 and 5 have been noted on at least one other occasion. The Supreme Court held in *Allen v. State Board of Elections*, *supra*, that Section 5 was "intended to reach any state enactment which altered the election law of a covered State in even a minor way." 393 U.S. at 566. This reference to a "minor way" is indicative that Section 5 goes to the mechanics of voting, *i.e.*, the "standard, practice or procedure" that requires pre-clearance (*Haith*, 618 F. Supp. at 413), rather than the fundamental right to vote for those who govern (*Thornburg v. Gingles*, *supra*) and therefore reinforces the distinction between Sections 2 and 5 and thus precluding the application of *Haith* to a Section 2 case.

Lastly, it may also be noted that the legislative history of Section 2 specifies that some practices that call into operation Section 5 do not necessarily run afoul of Section 2. For example, throughout the legislative history it is repeatedly noted that jurisdictions that require Department of Justice pre-clearance pursuant to Section 5 may have no Section 2 practices or violations. Senate Report, *supra*, at 68 & n.224.

While conceding that the argument that judges are not "representatives" is "a powerful one," U.S. Br. 34, the United States tries to take the edge off the prospect that the results test would be applied to a judicial election in the same way that it is applied to a legislative election by invoking the "totality of [the] circumstances" standard for a Section 2 challenge. Thus, the United States argues that because a judge performs duties unlike a typical representative, the functions or duties of the elected official may be a factor for a court to consider as part of the "totality of circumstances" test. U.S. Br. at 35. Yet

the nature of the office holder's function appears nowhere in the statute or the legislative history as a circumstance to be considered.

Section 2 explicitly states that "[t]he extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered." 42 U.S.C. 1973(b). In addition, the Senate Report that accompanied the 1982 amendments to the VRA identified seven factors that could be considered as part of the relevant circumstances, such as the "extent to which voting in the elections of the state or political subdivision is racially polarized," and the "extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process." *See* Senate Report at 28-29 (1982). These factors have been recognized as "authoritative" by this Court. *Thornburg v. Gingles*, 478 U.S. 30, 43 n.7 (1986).

But nowhere in the statute or legislative history is there anything to suggest that the nature of the elected judge's function is to bear upon the meaning of "totality of circumstances"; indeed, petitioner Chisom, *et al.*, assert that at the trial in this case below, they proved *all* the seven factors identified by the Senate Report were present in their case. Chisom Br. 7-21. If Congress did indeed intend to include a whole branch of government within the sweep of Section 2 by using the term "representative," it certainly would have said something suggesting that functions performed by the elected official, *i.e.*, judges, would be a factor to be considered as part of the "totality of circumstances."

Thus, Chisom's proof of voting discrimination against blacks for the position of Louisiana Supreme Court Judge consists of noting that "[a]lthough 29 percent of Louisiana's citizens are African American, every supreme court district is majority-white both in total population and in number of registered voters. . . . No African American person has been elected to the Louisiana Supreme Court in modern times." Chisom Br. 7.

Yet the notion that it is relevant to compare the percentage of blacks in Louisiana to the percentage of black judges elected, especially to the 7 member Supreme Court which is the actual case here, is absurd. The relevant labor or candidate pool, so to speak, is not all black voters in Louisiana, but those qualified for the position. As previously noted, only those Lousiana citizens who have gone to law school, passed the bar, and were lawyers for at least 5 years are qualified to run for judicial office. LSA-R.S. 18:401(B). In that regard, *amici* submit that the percentage of qualified black lawyers is substantially lower than the percentage of black voters. [5] Thus, while it may make some sense to use population percentages with respect to assessing voter dilution claims with respect to elections to the legislative or executive branches inasmuch as those offices do not require the candidate to hold any degree, let alone post-graduate degrees, it is inappropriate to use those same population statistics in the context of judicial elections.

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[5] Because candidates for the Lousiana Supreme Court generally come from the lower courts, a more accurate calculation of the qualified candidate pool would be the current members of the lower courts, of which approximately six percent are black. Even this figure is large since it does not factor in the residency requirement that the judge reside in the district in which he or she is elected.

In addition, Chisom argues that certain socioeconomic factors such as education and employment can be used to show discrimination in the election of judges to the Supreme Court because black judicial candidates "have considerable difficulty raising campaign funds and that generally, the better funded candidates win." Chisom Br. 20. [6] Presumably, this socioeconomic factor referred to in the Senate Report as part of the "totality of circumstances" test can also be used to demonstrate the paucity of the number of qualified black lawyers and judges for the Supreme Court positions.[7]

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[6] *Cf. Williams v. City of Dallas*, 734 F. Supp. 1317, 1415 (N.D. Tex. 1990)(Voting Rights Act violated because "African-Americans and Hispanics . . . cannot raise--from their own communities" enough money to run effective campaign for at-large city council seat)(emphasis in original).

[7] Lousiana State University Law School graduates who took the Louisiana bar exam in 1990 had a pass rate of 81.4%; Loyola's rate was 62.2%; Tulane's rate was 60.9%; and Southern (which is over 90 percent black) had a pass rate of only 29.8%. Indeed, the pass rate overall for blacks, regardless of the law school attended in Louisiana, was 33.3%. *See* Memorandum of Dean John Kramer, Tulane University Law School, Oct. 4, 1990, *cited in* Tulane Law School, *Dicta: From the Bench*, Dec. 3, 1990 at 1. According to Dean Kramer, "[W]e encourage [minorities] to come here and then [they] graduate into an employment void based upon bar failure, but loaded with debt. * * * We have taken a commendable admissions risk, but the gamble didn't pay off in 1990. . . and the losers are not us, but those who[m] we invited and now watch twisting in the wind until the next exam or another state beckons." Id. According to petitioner's socioeconomic theory, these educational disadvantages which keep blacks from having the same opportunity as other members of the electorate "to participate in the political process and to elect representatives of their choice" presumably constitute yet additional evidence of a violation of Section 2 of the Voting Rights Act.

CONCLUSION

As the lower court held, "[s]hould Congress seek to install [a results] test for judicial elections, it must say so plainly. Instead, it has thus far plainly said the contrary." 914 F.2d at 631. And as this Court has said in a related context, "Congress, should it wish to do so, may * * * amend Title VII [to clearly express its intention that the law is to be applied abroad] and in doing so will be able to calibrate its provisions in a way that we cannot." *EEOC v. Arabian American Oil Co.*, 59 U.S.L.W. 4225 (U.S. Mar. 26, 1991).

For all the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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